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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM DAVID GLENN,

Defendant and Appellant.

C088831

(Super. Ct. No. CRF184920)

Defendant William David Glenn pled no contest to possession of methamphetamine for sale. The trial court sustained a strike allegation and sentenced defendant to a two-year eight-month state prison term.

On appeal, defendant contends the trial court violated his Sixth Amendment rights by sustaining the strike allegation based on the record of the preliminary examination for that conviction. The People concede the issue. Agreeing with the parties, we shall vacate the strike finding and remand for additional proceedings.

## BACKGROUND

We dispense with the facts of defendant's current offense as they are unnecessary to resolve this appeal.

### I

#### *Proceedings In The Prior Conviction*

In 2009, defendant pled no contest to battery with serious bodily injury and theft with a prior theft conviction.

According to the preliminary examination in that case, on July 15, 2009, around 6:00 p.m., Michael U. went to River Walk Park in West Sacramento to mourn the loss of his best friend's son. He was hanging out and drinking beer at the park with his friend, Alex Roy. He had six to eight beers by that time. Michael went home to eat at one point and returned to the park around 8:00 p.m., after which he drank two 24-ounce cans of beer. Michael rode his bicycle to a nearby store to get more beer about 45 minutes later, buying five 24-ounce cans of beer with cash.

Defendant and another person approached Michael from behind as he slowly biked back to the park. One of them asked Michael for a cigarette but he did not have one. Michael was then knocked off the bicycle and lost consciousness. He next remembered he was on the ground bleeding, with Roy telling him, "come on, let's go before they come back." His shoes, socks, bicycle, beer, and money were missing. He later went to the hospital, where he received about 30 stitches inside his jaw to reattach his gums and four stitches on his lip. He lost one tooth and several fillings during the attack.

West Sacramento Police Officer Mark Marquez testified at the preliminary hearing. Dispatched to investigate the attack, he talked to Roy, who identified defendant as the assailant. According to Roy, defendant repeatedly kicked Michael in the head until he passed out. Roy tried to stop defendant, but the other man with defendant grabbed

Roy and hit him. Defendant and the other man took off with Michael's bicycle and shoes after the attack.

At the change of plea hearing, the trial court amended the plea form to include the theft charge in count 4. The battery charge defendant would be pleading to was count 2. The prosecutor stated, "I think we can use the preliminary hearing transcript as a factual basis for Count 2, I would have to put a factual basis on the record for Count 4." After determining defendant understood the plea agreement and had discussed it with counsel, the trial court asked the prosecutor, "you said that Count 4 needs its own factual basis. Is that not the same thing we could find the factual basis of Count 1?" The prosecutor replied that it was except for defendant having a prior conviction and serving jail time.

After the prosecutor provided the missing facts regarding the prior conviction for the theft offense, the trial court told defendant: "you were in a preliminary hearing on this case on September 3rd in front of Judge Warriner. [Defense counsel] was there and [the prosecutor]. A witness testified, and apparently two witnesses that day, and you heard the evidence against you. [¶] Do you understand what the evidence would be in this case if you went to trial, sir?"

Defendant replied that he did and then pled no contest. The trial court asked if counsel would stipulate to a factual basis. Both parties assented.

## II

### *Current Case*

Defendant's plea included a 16-month stipulated sentence, which would be doubled if the trial court sustained the strike allegation. The strike allegation was based on the 2009 conviction for battery with serious bodily injury. In briefing before the bench trial on the strike allegation, defendant argued that his 2009 prior was not a serious or violent felony and the preliminary hearing transcript in that case was not part of the record of conviction. The trial court found the preliminary hearing transcript was part of the record of conviction, as it formed the factual basis of the plea. After the prosecution

introduced an abstract of judgment, the trial court found the 2009 conviction was a serious felony and sustained the strike allegation.

## DISCUSSION

Defendant contends the trial court could not use the preliminary hearing record as a basis for sustaining the strike allegation because the parties did not stipulate to it at the 2009 change of plea hearing. He additionally argues that the preliminary hearing record does not support the strike allegation even if it was properly admitted. The People claim the parties did stipulate to the preliminary hearing as the factual basis for the plea in 2009, but using the transcript to support the strike allegation violated defendant's Sixth Amendment jury trial right. We agree with the People.

A prior conviction for a crime listed in Penal Code<sup>1</sup> section 1192.7, subdivision (c) is a "serious felony" that counts as a strike for sentence enhancement purposes. (§ 667, subd. (d)(1).) Although battery with serious bodily injury (§ 243, subd. (d)) is not listed in section 1192.7, subdivision (c), it qualifies as a strike if the defendant personally inflicts great bodily injury on a nonaccomplice or personally uses a deadly or dangerous weapon or firearm. (§ 1192.7, subd. (c)(8), (23); see *People v. Bueno* (2006) 143 Cal.App.4th 1503, 1508 ["to establish that the battery was a serious felony the People were required to show that [the defendant] *personally* inflicted the injury, rather than that he aided and abetted another [citation], and that the victim was not an accomplice".]) The element of great bodily injury under section 1192.7, subdivision (c)(8) is essentially equivalent to serious bodily injury under section 243. (*Bueno*, at p. 1508, fn. 5.)

The fact of a prior conviction does not include all factual issues relating to the prior conviction; some issues must be decided by a jury unless defendant waives that

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

right. Disapproving its earlier holding in *People v. McGee* (2006) 38 Cal.4th 682, the California Supreme Court held: “a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the ‘nature or basis’ of the prior conviction based on its independent conclusions about what facts or conduct ‘realistically’ supported the conviction. [Citation.] That inquiry invades the jury’s province by permitting the court to make disputed findings about ‘what a trial showed, or a plea proceeding revealed, about the defendant’s underlying conduct.’ [Citation.] The court’s role is, rather, limited to identifying those facts that were established by virtue of the conviction itself -- that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea.” (*People v. Gallardo* (2017) 4 Cal.5th 120, 136, fn. omitted; see *id.* at p. 125.) The trial court in *Gallardo* had violated the defendant’s Sixth Amendment right to a jury trial by engaging in a form of factfinding about the nature or basis of the defendant’s assault guilty plea. (*Id.* at pp. 124-125, 136-137.)

The trial court in *Gallardo* found that the defendant’s prior conviction for assault with a deadly weapon or force likely to produce great bodily injury (§ 245, subd. (a)) was a strike based on the victim’s testimony at the preliminary hearing that the defendant used a knife. (*People v. Gallardo, supra*, 4 Cal.5th at p. 136.) However, nothing on the record showed that the “defendant adopted the preliminary hearing testimony as supplying the factual basis for her guilty plea.” (*Ibid.*) The Supreme Court concluded, “By relying on the preliminary hearing transcript to determine the ‘nature or basis’ of defendant’s prior conviction, the sentencing court engaged in an impermissible inquiry to determine ‘ “what the defendant and state judge must have understood as the factual basis of the prior plea.” ’ [Citation.] Because the relevant facts were neither found by a jury nor admitted by defendant when entering her guilty plea, they could not serve as the basis for defendant’s increased sentence here.” (*Id.* at p. 137.)

Defendant claims that, as in *Gallardo*, the trial court could not rely on the preliminary hearing transcript because nothing on the record suggests defendant or his counsel adopted it as the factual basis for the plea. Not so. The prosecutor stated at the outset of the plea hearing that the preliminary hearing could form the factual basis of the battery with great bodily injury count but an additional factual basis was needed for the theft count. After the additional facts needed for the theft count were recited by the prosecutor, the trial court determined that defendant was present at the preliminary hearing and understood what evidence would be presented against him at trial. Defense counsel and the prosecution then stipulated to the factual basis of the plea. The most reasonable conclusion to draw from these facts is that the defense accepted the prosecutor's offer of the preliminary hearing as the factual basis for the plea, and the parties' stipulation to the factual basis included the preliminary hearing transcript.

While this case is distinguished from *Gallardo* by the presence of evidence supporting the trial court's finding that the preliminary hearing transcript formed the factual basis of the plea, the result here is the same as in *Gallardo*. A guilty plea admits all elements of the charged offense, "but no more." (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1206.) Stipulating to a particular document like a complaint as the factual basis for the plea does not waive the Sixth Amendment right to a jury trial regarding additional facts beyond the elements of the charged offense. (*Ibid.*) Since defendant did not admit or stipulate to the fact that he personally inflicted great bodily injury on his victim in the 2009 assault, the trial court could not make such a finding without violating defendant's jury trial rights.<sup>2</sup> The true finding on the allegation must be

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<sup>2</sup> Even if the trial court could rely on the evidence at the preliminary hearing to make this finding, the preliminary hearing transcript does not support the strike allegation. The only evidence that defendant personally inflicted great bodily injury on the victim is Officer Marquez's testimony that the victim's friend Roy told him so. This is inadmissible hearsay, and, since Roy's statement to the investigating officer is also

reversed. The People can seek to retry the strike allegation on remand. (*People v. Gallardo, supra*, 4 Cal.5th at p. 138.) If the People do not seek retrial, then the trial court shall resentence defendant.

#### DISPOSITION

The finding that defendant's prior section 243, subdivision (d) conviction was a serious felony within the meaning of the three strikes law is reversed, and the enhancement imposed for that prior conviction is stricken.

If the People elect to retry the strike allegation, the trial court shall resentence defendant following retrial. If, within 60 days after the remittitur issues from this court, the People have not filed and served an election to retry the strike allegation, the trial court shall dismiss the strike allegation for the prior conviction and resentence defendant.

/s/  
Robie, Acting P. J.

We concur:

/s/  
Mauro, J.

/s/  
Renner, J.

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testimonial, it is a violation of *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177].